"....It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others."

In the present case, as I have already stated, an appeal lay from the Resident's native court to the Native Court of Appeal. That Native Court of Appeal is presided over by a judge of the High Court and must therefore be considered a court which is competent to decide any question of law. The fact that the decision of the presiding judge on a question of law could be overriden by other members of the court is beside the point. The question of crossing that bridge would arise only when the bridge is reached. In so far as his complaint against the quashing by the Resident's native court of the order made in his favour by the district court was concerned, the plaintiff should have appealed to the Native Court of Appeal instead of going to the High Court. As regards his right to prosecute such appeal, the plaintiff, ironically, will now find himself in the same position as the first defendant when he failed to appeal to the Resident's native court within the prescribed time. The High Court in striking out the portions in his writ of summons and the statement of claim in relation to the declarations sought expressly left it open to the plaintiff to pursue his claim for damages on grounds of conspiracy.

For the reasons I have stated, the plaintiff's action, in so far as it related to his claim for the declarations sought, was clearly misconceived, and the learned judge in the court below was quite right in making the order for that part of his claim to be struck out. I would therefore dismiss this appeal with costs.

*Appeal dismissed.*

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## LEONG BEE & CO. v. LING NAM RUBBER WORKS

**[P.C. (Lord Hodson, Lord Guest & Sir Frank Kitto) July 6, 1970]**

**[Privy Council Appeal No. 23 of 1968]**

*Negligence — Fire — Fire breaking out in a factory and spreading to building next door — Outbreak of, not reasonably foreseen — Finding of negligence by trial judge unsupported by evidence.*

*Nuisance — Allegation that appellant caused or permitted in their premises a danger of fire within the range of reasonable foreseeability — Whether foreseeability of injury an ingredient in tort of negligence — Foreseeability an element in proof of responsibility.*

This was an appeal against the decision of the Federal Court reported in [1968] 1 M.L.J. 216. The facts were that a fire broke out in the early hours of a Sunday morning at a factory building occupied by the respondents at Tampoi, Johore Bahru and it spread to the building next door which was owned and occupied by the appellants and destroyed it also. The appellants sued the respondents for damages for the loss occasioned to them by the fire, asserting causes of action in negligence and nuisance. The trial judge gave judgment for the appellants on the claim in negligence but dismissed the claim in nuisance. On appeal to the Federal Court the decision of the trial judge on the claim in negligence was reversed, but they dismissed a cross appeal on the claim in nuisance. The appellants appealed to the Privy Council.

**Held,** dismissing the appeal: (1) in this case there was no evidence that the respondents either had brought on their land a source of fire danger imperilling the appellant's property in the form of a building or materials likely to catch fire or of machinery likely to commence a fire or they had permitted a condition conducive to an outbreak of fire to exist there and therefore no judgment on the claim in nuisance could properly have been given for the appellants;

(2) the Federal Court was right in holding that an outbreak of fire on the respondent's premises in the early hours of the morning was not reasonably to be foreseen and therefore the respondents owed no duty to the appellants;

(3) the only duty which the respondents owed to the appellants in respect of a fire not caused by any act or omission of theirs or any servant or agent of theirs was based upon knowledge of the fire, ability to foresee the consequences to the appellants of not checking it and, ability to abate it, and in the circumstances of the case there was no evidence of failure of such duty;

(4) the finding of negligence against the respondents was unsupported by the evidence, and the Federal Court was right in setting aside the judgment which had been given for the appellants.

**Semble:** The common law presumption referred to in *Becquet* v. *Mac Carthy*[2]; *Musgrove* v. *Pandelis*[3] and *Mason* v. *Levy Auto Parts of England Ltd.*,[4] that a fire which began on a man's property arose from some act or default for which he was answerable, has no application in Malaysia having been displaced by statute, first by 6 Anne c. 31, s. 6 and later by the Fires Prevention (Metropolis) Act, 1774, the presumption formed no part of the common law of England at the date of the coming into force of the Civil Law Ordinance, 1956.

*Cases referred to:-*

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

(2) *Becquet* v. *Mac Carthy* (1831) 2 B & Ad. 951 at p. 958.

(3) *Musgrove* v. *Pandelis* [1919] 1 K.B. 314 at p. 317.

(4) *Mason* v. *Levy Auto Parts of England Ltd.* [1967] 2 Q.B. 530 at pp. 538, 539.

(5) *Overseas Tankship (U.K.) Ltd.* v. *Norts Dock & Engineering Co. Pty. Ltd.* [1961] A.C. 388.

(6) *Goldman* v. *Hargrave* [1967] A.C. 645.

(7) *Longhurst* v. *Metropolitan Water Board* [1948] 2 All E.R. 834 at p. 839.

(8) *Overseas Tankship (U.K.) Ltd.* v. *Miller Steamship Co.* [1967] A.C. 617 at p. 639.

(9) *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880 at p. 897.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

*Mervyn Heald Q.C.* and *George Newman* for the appellants.

*Robert Gatehouse Q.C.* and *Peter Mooney* for the respondents.

**Sir Frank Kitto:** In the early hours of Sunday, 2nd February 1964, a fire broke out in a factory building occupied by the respondents in Tampoi, Johore Bahru, and spreading to the building next door, which was owned and occupied by the appellants, it destroyed that also. The appellants sued the respondents in the High Court in Malaya at Johore Bahru for damages for the loss occasioned to them by the fire, asserting causes of action which, as the case proceeded, were identified by common consent as negligence and nuisance. The doctrine of *Rylands* v. *Fletcher*[1] was re-

lied upon in the early stages of the case, but the evidence provided no basis for its application and it was put aside.

The Chief Justice, Malaya, who tried the action, gave judgment for the appellants for a substantial sum on the claim in negligence, but on appeal to the Federal Court of Malaysia his decision was reversed. The Federal Court set aside his judgment, ordered that an amount of damages that had been paid thereunder should be repaid to the respondents, and dismissed a cross-appeal seeking judgment in the appellants' favour on their claim in nuisance and an increase in the amount of damages. From the order of the Federal Court the present appeal is brought.

Counsel for the appellants conceded in argument, and their Lordships do not doubt rightly conceded, that in Malaysia the common law presumption referred to in *Becquet* v. *Mac Carthy*[2] at p.958, *Musgrove* v. *Pandelis*[3] and *Mason* v. *Levy Auto Parts of England Ltd.*,[4] that a fire which began on a man's property arose from some act or default for which he was answerable, has no application in Malaysia and has had no application there at least since the coming into force of the Civil Law Ordinance, 1956, s. 3. The reason is that having been displaced by statute, first by 6 Anne c. 31, s. 6 and later by the Fires Prevention (Metropolis) Act, 1774, 14 Geo. 3, c. 78, s. 86, the presumption formed no part of the common law of England as administered in England at that date. Upon the appellants lay the burden of proof as to both negligence and nuisance, and their task at the trial was to establish, without the aid of the presumption, (a) that the respondents themselves or some person for whose conduct they were answerable had been guilty of some negligent act or omission which was a cause either of the commencement of the fire or of its spreading to the appellants' premises, or (b) that the respondents had caused or permitted to exist on their premises a source of fire danger constituting a material injury to the appellants' property. If they succeeded on either issue they had further to establish, for the assessment of damages, that the destruction of their building was reasonably foreseeable as a consequence of a kind likely to flow from the respondents' wrongful conduct: *Overseas Tankship (U.K.) Ltd.* v. *Norts Dock & Engineering Co. Pty. Ltd.*[5]

As has been said, the trial judge found for the appellants on negligence only. The case in nuisance he dismissed for the reason, as he made clear by a discussion in his judgment of particular matters of complaint, that the appellants had not proved that either the construction of the respondents' building, the nature of its contents or the condition in which it was kept had placed the appellants' building in material jeopardy. The Federal Court, too, rejected the claim in nuisance, but did so upon the ground, as expressed, that foreseeability is an element in the tort of nuisance, and that an outbreak of the fire in the respondents' building at the hour when in fact that fire occurred was not reasonably to be foreseen by the respondents. The court referred in this connection to the judgment in *Goldman* v. *Hargrave*[6] but it is important to observe that it was not there laid down that forseeability of damage to another's property is an essential ingredient in nuisance. Their Lordships did indeed (at pp. 656, 657) refer to negligence as being decisive of nuisance in some situations, but they were at pains to point out that the case they were considering was one where an occupier, faced with a hazard accidentally arising on his land, had failed to act with reasonable prudence so as to remove the hazard, and that it was not one where an occupier had brought a source of danger on to his land or so used his property as to cause a danger to his neighbour. The foreseeability of the kind of injury that occurred was relevant to the claim in nuisance because without it there would have been no ground for holding that such an impairment of the safety of the neighbour's property as substantially prejudiced the enjoyment or other benefit to which his proprietary rights entitled him was fairly to be laid at the door of the occupier. Lord Porter observed in *Longhurst* v. *Metropolitan Water Board*[7] that "liability for nuisance without negligence or deliberate act is not readily established, apart, of course, from cases of the *Rylands* v. *Fletcher* type"; and Lord Reid in his judgment in *Overseas Tankship (U.K.) Ltd.* v. *Miller Steamship Co.*[8] said that fault of some kind — Lord Atkin had described it as some degree of personal responsibility, in *Sedleigh-Denfield* v. *O'Callaghan*[9] — is almost always necessary, and that that generally involves foreseeability. But this is not to say that foreseeability of injury to a neighbour is an ingredient in the tort. It means only that without proof of a likelihood which the person charged ought reasonably to have appreciated of injury to the neighbour's property — foreseeability, it must be remembered, relates to likelihood, not bare possibility — there is, generally speaking, no ground for holding him guilty of detracting from the benefits which the neighbour was entitled to have of his property. Thus, as Lord Reid remarked in *Overseas Tankship (U.K.) Ltd.* v. *Miller Steamship Co.* at p. 640 which was a case of a danger created in navigable waters, in the class of nuisance which includes creating such a danger foreseeability is an essential element in determining liability; not, that is to say, an element in the cause of action, but an element in the proof of responsibility for the creation of a danger that was real and substantial.

The case which the appellants sought to make at the trial as regards nuisance was that the respondents either had brought on to their land a source of fire danger imperilling the appellants' property, in the form of a building or materials likely to catch fire or of machinery likely to cause a fire, or that they had permitted a condition conducive to an outbreak of fire to exist there. If it had been established that by either means they had endangered their own property it must inevitably have been held that they had also placed the appellant's property at corresponding risk; for the two buildings were only fourteen feet apart

Several suggestions were advanced on behalf of the appellants, with varying degrees of firmness, as to ways in which the respondents might be considered to have caused or permitted on their premises a danger of fire within the range of reasonable foreseeability, but their Lordships, after consideration of the whole of

the evidence, find no reason to disturb the trial judge's conclusion that no such hazard was proved. The respondents' building, which was used as a factory for the vulcanizing of rubber sheets for the manufacture of slippers, had no features about it that should reasonably have suggested a likelihood of fire. The floor was of concrete, the walls were of brick surmounted by corrugated iron supported by wood, and the only interior dividing wall was of corrugated iron. Though the building was described by one witness as a fire hazard, there was no material upon which a finding could properly have been made that either its construction or the way in which it was being used at the time when the fire started created any material danger of fire. The contents, apart from machinery, consisted of processed rubber sheets and rubber residues not easily combustible, some tins containing black oil having a high flash point and not readily ignited, some chemical powder that was found not to be inflammable, and some tins which, though they contained rubber cement of an inflammable volatile nature, came through the fire intact. There was conflicting evidence as to whether the floor was kept clean, but although the judge found that after the fire some slicks of oil were observed there was no evidence upon which a finding could have been made that the state of the floor constituted a danger to the appellants' property. There were in the building twelve machines of which nine were equipped with electric motors, but they had been idle for many hours before the fire was discovered. The possibility of an electrical fault of some kind was touched upon in the evidence, but the wiring had been inspected late in 1963 without any defect being discovered, and when the electrical installation was examined by an engineer of the National Electricity Board immediately after the fire nothing was found by him to suggest that the fire had been due to a short circuit or that the wiring was other than sound. It is conceivable that a spark was emitted from one of the machines during the previous day's work and caused a smouldering of slowly combustible material which went on for hours before any flame appeared; but an inspector of machinery at Johore deposed that the motors were adequately enclosed for preventing the escape of sparks during operation and that when the machines were not running — and they were not in use at any time that was proved to be material — there was no danger of sparks at all. There was, in short, no evidence upon which judgment on the claim in nuisance could properly have been given for the appellants. On this part of the case their Lordships find themselves in agreement with both the courts in Malaysia.

What in fact caused the fire remained at the end of the case a matter of speculation. Whether the origin was some event for which the respondents should be held responsible on the ground of negligence, or some carelessness or even some wilful act on the part of a stranger, or some mischance for which no one could be held accountable, are questions upon which the trial judge was unable to make any finding. But he was satisfied, on sufficient evidence, that the fire began on the respondents' premises, and his finding in that respect was necessarily accepted by the Federal Court. The question upon which that court differed from him was whether the spread of the fire from the respondents' premises to those of the appellants resulted from some negligent omission of the respondents or of a watchman who was their only servant on the premises at material times. The judge found for the appellants upon three allegations which they had made in the form of particulars of negligence. They were, first, that the respondents had failed to take any or any proper precautions to deal with a fire if it should arise; secondly, that the respondents had failed to raise an alarm when the fire started, so as to enable the spread of it to be efficiently checked; and, thirdly, that the respondents had failed to take any or any proper steps to prevent the spread of the fire. The judge mentioned several matters in respect of which he considered that the respondents had been at fault. They had provided several fire extinguishers in their building, but these were not used. They had installed the watchman, but the judge considered that the watchman was incompetent to deal with a case of fire. He doubted whether the watchman was awake at material times, and he thought that some hours before the fire was discovered the smell of burning rubber should have alerted a competent person. Moreover, the evidence established that the watchman, after he had wakened, omitted to telephone the police or the fire brigade. These considerations seemed to the judge sufficient for a decision that the respondents were liable to the appellants in negligence.

The judges of the Federal Court took a different view, both as regards the fault attributed to the respondents themselves in employing an incompetent watchman and as regards the failures of the watchman after he knew that the respondents' building was on fire. They considered that an outbreak of fire on the respondents' premises in the early hours of the morning was not reasonably to be foreseen, and that therefore the respondents owed the appellants no duty to have a competent and alert watchman on the premises at the material times. They were also of opinion that no omission of which the watchman was guilty after he became aware of the fire could be considered a cause of the destruction of the appellants' building.

Their Lordships are satisfied that the conclusions of the Federal Court were right. A close scrutiny of the evidence reveals nothing that ought reasonably to have suggested to the respondents a need to have a man keeping constant watch against fire during the night, when no work was in progress and the factory was closed. It was therefore immaterial that the watchman they employed was incompetent and failed to detect the fire until it was well alight. For the appellants, reliance was placed upon the fact that the respondents had evidently considered it prudent to employ a watchman, and that, as the watchman himself said in evidence, his duty was to guard against both theft and fire. The contention was made and pressed that in these circumstances it did not lie in the mouths of the respondents to say that no need existed to have a watchman constantly on the alert for any sign of fire. The answer is sufficiently obvious. The duty which the watchman acknowledged in respect of fire was a duty that he owed only to the respondents as his employers, and its existence is irrelevant to the question whether the respondents owed a duty to the appellants.

The employment of the watchman shows no more than that the respondents had been sufficiently concerned about the safety of their property from theft or fire to have there the watchman whom they employed. That fact would not support an inference that they considered their building any more likely to catch fire than the ordinary run of buildings, and still less would it support a conclusion that a reasonable person in their position would have thought an outbreak of fire so likely that reasonable care in the interests of neighbours would not be taken unless an efficient watch were kept throughout the night.

The only duty, then, which the respondents owed to the appellants in respect of a fire not caused by any act or omission of theirs or of any servant or agent of theirs was the duty which arises under the principle explained in *Goldman* v. *Hargrave*.[6] It was a duty based upon knowledge of the fire, ability to foresee the consequences to the appellants of not checking it, and ability to abate it. The knowledge of the watchman is necessarily to be attributed to the respondents, and the consequences to the appellants of an extension of the fire to their building were plainly foreseeable by anyone in the position of the watchman after the fire had come to his notice. In these circumstances the only questions to be decided were whether the watchman, after he became aware of the fire, ought to have done anything more than he did with a view to saving the appellants' building, and, if so, whether his failure was a cause of the appellants' loss. He seems to have lost his head and done nothing beyond telling someone else to call the fire brigade, trying to telephone one of his employers, and helping to remove a vehicle from a place of danger. But the evidence failed to establish that when he was wakened, as apparently he was by the shouts of a neighbour, there was still time for him to do anything that might have saved the appellants' building. The neighbour, who had been sleeping in a caravan on adjoining property, was the first to observe the fire, and he gave evidence fixing the time as between 5 and 5.30 a.m. (He explained an earlier statement he had made fixing it at "about 4.30 a.m." as having given only an approximate time.) It was already, he said, a very big fire. The watchman himself said that he heard the shout of "Fire!" at about 5 a.m. Though the watchman did not telephone the fire brigade, someone did; and according to evidence given by the acting divisional fire officer who took charge of the brigade's operations — evidence which was based upon his records and upon which no doubt was cast at the trial — the brigade received the alarm at 5.30 a.m. An engine was despatched one minute later. It was followed by another, and they reached the fire at 5.35 and 5.44 a.m. respectively. The firemen put the fire out in about an hour, but they could not save the appellants' building. The acting divisional fire officer was asked at the trial whether he could have stopped the spread of the fire from the respondents' premises if the alarm had been given twenty to thirty minutes earlier than it was, and his reply was that he would not have been able to do so. In view of this evidence, and of the fact that a precise recollection of times was not to be expected of men caught up in the sudden excitement of so dramatic an event, it would have been clearly unsound for the judge to conclude that the respondents' watchman had such an opportunity to call the brigade that if he had taken it the appellants' building would have been saved.

The watchman's omission to use any of the fire extinguishers in the respondents' building must likewise be put out of the case. The extinguishers were destroyed in the fire, and there is nothing in the evidence to show that at the time when the watchman woke they were still usable and within his reach, or that if they were intact and within reach their use could have been of any avail. The acting divisional fire officer, it may be mentioned, gave evidence that extinguishers are useful only at the first stage of a fire.

In the result their Lordships are of opinion that the finding of negligence against the respondents was unsupported by the evidence, and that the Federal Court was right in setting aside the judgment which had been given for the appellants.

Their Lordships will report to the Head of Malaysia their opinion that the appeal should be dismissed and that the appellants should pay the respondents' costs of the appeal.

*Appeal dismissed.*

Solicitors: *Parker Garrett & Co.; Stephenson, Harwood & Tatham.*

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## NGUI KEE SIONG v. GUAN SOO SWEE & ANOR.

**[O.C.J. (Winslow J.) July 17, 1970]**
**[Singapore — Suit No. 388 of 1968]**

*Negligence — Highway — Junction controlled by traffic lights — Defective traffic lights — Duty of driver approaching defective traffic lights at controlled junction.*

*Road Traffic — Traffic lights at junction — Defective — Duty of driver approaching.*

*Damages — Personal injuries — Fractured femur, tibia and fibula — Multiple scars — 2½" shortening of left leg — Pain and suffering — Loss of earnings.*

A taxi driven by the first defendant in which the plaintiff was travelling as a passenger came into collision with a lorry driven by the second defendant at a junction of a minor road and a major road. The taxi was proceeding along the one-way major road while the lorry was entering the junction from the minor road. The junction was controlled by traffic lights. At the material time, the traffic lights were not functioning properly. In the direction of the minor road the traffic lights were changing at approximately two-second intervals from green to amber to green. In the direction of the major road the traffic lights were changing at a faster speed than usual, green, amber, red. The plaintiff brought an action against both drivers claiming damages for personal injuries as a result of the road accident. He suffered a compound fracture of his femur, tibia and fibula. There was severe and multiple scarring and a 2½" shortening of his left leg. He had a suppurating sinus in his left leg for a considerable length of time and there was permanent limitation of movement of the left leg. He was a junior officer in the Fisheries Department in Sarawak and as a result of his injuries could not continue as a field officer and was transferred and is now a clerical officer.

**Held:** (1) both the defendants were guilty of negligence in failing to keep any or any proper lookout and in failing